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The Method and Role of Comparative Law

Edward J. Eberle

Roger Williams University School of Law

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THE METHOD AND ROLE OF COMPARATIVE LAW

EDWARD J. EBERLE*

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I. INTRODUCTION

In our increasingly globally linked world, comparative law needs to take an ever more crucial role. With the rise of important new developments over the last thirty years, like the proliferation of the computer and the internet, global capital markets that begin in Asia and end in the United States, and the mutual trade in commodities like oil, foodstuffs, and metals, we are linked in important common ways. The computer, and especially its generation of the internet has made us, in

* Visiting Professor, Boston University School of Law and Distinguished Research Professor of Law, Roger Williams University School of Law. Copyright by Edward J. Eberle, 2008. All rights reserved. I would like to thank Vivian Curran, Jay Krishnan, Tim Kuhner, and Jim Whitman for helpful comments on this Article. Parts of this Article are based on Edward J. Eberle, *Comparative Law*, 13 ANN. SURV. INT'L & COMP. L. 93 (2007).

effect, a global village. Still, of course, there are differences among areas of the world and countries, notwithstanding our common linkages. And so, that brings us to the topic at hand: assessing the role and methodology of comparative law so that we can come up with a sound methodological framework to better understand the role of law in different countries as a way of promoting insight and knowledge and, perhaps, some degree of harmonization over critical issues or, at least, a measure of common understanding. The gathering of knowledge obtained through comparative law can be a vital portal to a foreign culture. The insights gathered can usefully illuminate the inner workings of a foreign legal system. And these insights can be applied to our own legal culture, helping illuminate different perspectives that may yield a deeper understanding of our legal order.

First, some insight into comparative law. The essence of comparative law is the act of comparing the law of one country to that of another. Most frequently, the basis for comparison is a foreign law juxtaposed against the measure of one's own law. But, of course, the comparison can be broader: more than two laws, more than law, more than written words.

The key act in comparison is looking at one mass of legal data in relationship to another and then assessing how the two lumps of legal data are similar and how they are different. The essence of comparison is then aligning similarities and differences between data points, and using this exercise as a measure to obtain understanding of the content and range of the data points. Here we need to focus quite carefully on the similarities and differences among the data points derived from the different legal systems.¹ What is the substance of the data point? How does it diverge from the point to which it was compared? What is the nature of the divergences? What do the divergences and similarities reveal? On what data are the revelations based?

It is not enough simply to compare words on the page. Law sits within a culture. Law both drives and is influenced by the culture of the home country. So we must look beneath the law as written formally in text. We need to excavate the underlying structure of law to understand better what the law really is and how it actually functions within a society. To do this, we need to explore the substructural forces that influence law. These can be things like religion, history, geography, morals, custom, philosophy or ideology, among other driving forces. Professor Bernhard Grossfeld and I

1. John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 620 (1998).

have referred to these forces as “invisible powers.”² Rodolfo Sacco terms these underlying influences “legal formants,” influences that help drive the formation of law.³ The point, simply stated, is that to get a complete understanding of law, we need to look fully at how law operates within a culture.

To do this, we need to learn to look at the law of a foreign country carefully. Critical here is the need to free ourselves from our own biases derived from our own culture, or what Vivian Curran refers to as a “cognitive lock-in.”⁴ This entails, first, immersion in the culture under review. Second, once the culture has been studied and the results gathered, we need to step outside that culture and view the data carefully and objectively. We should learn to apply the skills of a scientist; looking clear-eyed and straightforwardly at the legal data points derived from foreign cultures, and then carefully assessing them, understanding the legal concepts as written and as influenced by the substructural elements. To do this well, we should look to the skills of an anthropologist, learning the techniques necessary to understand foreign cultures in a neutral, unbiased way. We can thus rid ourselves of our cultural biases, whether from our own culture or the foreign culture under review.

As we reassess the methodology of comparative law, we need also to reassess the purposes and missions served by comparative law. Generally, comparative law has been employed as a discipline to understand foreign law and culture. It is also used to understand our own culture better through the process of comparison to another culture. In the post-World War II emergence phase, especially in the United States due to the transplantation of European emigres from the Nazi era,⁵ comparative law has sometimes entailed a search for universal principles of law that transcend culture, primarily in the field of private law,⁶ but with elements

2. Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT'L L.J. 291 (2003).

3. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law II*, 39 AM. J. COMP. L. 343, 385 (1991).

4. Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43 (1998).

5. Perhaps the Nazi-era emigres' quest was based on a pursuit of natural law, principles that would stand over and above human nature as an extrinsic code of conduct to regulate behavior. Perhaps commitment to such universal principles would ward off the demons of base human nature, as experienced by these emigres in the time of Hitler and Stalin.

6. For example, we might also point to the United Nations Commission on International Trade Law's (“UNCITRAL's”) movement toward the harmonization of private law, including the highly successful Convention on International Sale of Goods (“CISG”) that bridges civil and common law contract principles. Unification of private law is also “a task undertaken by the Institute for the

transforming public law as well.⁷ These are all important missions of comparative law.

But now, we must ask, should comparative law step outside its traditional missions and embark on grander pursuits? For example, should comparative law play a larger role in shedding light and, perhaps, helping solve important public policy questions—questions that often transcend national borders? Such important concerns could include informational and data privacy, consumer protection, antitrust law, or intellectual property, to mention just a few. Or comparative law could be used to illuminate issues of great importance to the human person. Traditionally, the focus here has been on private law, including subjects like contracts, property, and choice of law. But now there is a burgeoning field of comparative constitutional law. A deeper comparative focus on constitutional orders might lead us to question and reexamine core principles of the constitutional order, like freedom of speech, freedom of religion, equality, or structural matters like separation of powers.

Comparative law should also focus more intently on non-Western legal orders. Especially crucial for consideration are the legal cultures of Asia, most notably, those of China and India—two rising superpowers—and of Japan, which is already an important player on the world stage. Focus should also turn more intently on indigenous peoples, whose practices might yield insight into human behavior unencumbered by the complications of the modern world. Evaluation of older cultures in place before the rise of legal systems can yield important information about the

Unification of Private Law (UNIDROIT).” Sompong Sucharitkul, *Unification of Private Law and Codification of International Law*, 3 UNIFORM L. REV. 693, 693 (1998).

7. Here we might note, for example, the creation of the United Nations and its many missions and treaties, such as the United Nations Convention on Human Rights or the United Nations Convention for the Rights of the Child. Or we might consider the International Bill of Rights that consists of three documents: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

Certainly the quest for common, unifying principles has been a goal of post-World War II international law.

We can find the notion of human rights in all societies and at all times, in Europe as well as in Asia and Africa, in antique as well as in modern Chinese philosophy, in Hinduism, Buddhism, Christianity, Judaism, and Islam. The idea of human dignity is common to all these concepts, which emphasize different values according to the different conditions and diverse societies in which the human beings happen to be living. Human dignity and tolerance constitute the basic core of human rights.

Sompong Sucharitkul, *A Multi-dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305, 306 (1986–1987).

For an evaluation of the role of foreign law in the United States, see Timothy K. Kuhner, *The Foreign Source Doctrine: Exploring the Role of Foreign and International Law in Interpreting the Constitution*, 75 U. CIN. L. REV. 1389 (2007).

basic elements and structure of modern societies. Looking at ourselves through these mirrors could reveal important ideas, norms, rules, or principles, forcing a reevaluation that may improve the social order or, alternatively, lead us to confirm the tenets of our own legal system.

In taking on this new mission, comparative law can learn a lot from other disciplines that have arisen in the last thirty years to challenge conventional ways of thinking. Important disciplines to consider are the wide range of Critical Legal Studies, law and economics, law and sociology, and feminism, to name just a few. Like these disciplines, comparative law must also stand on its own as an independent, scientific discipline.⁸ With a keen focus on comparative law, we can reassess the underlying principles that make up the legal order and determine what, if anything, needs to be done, nationally, regionally, or internationally.

To accomplish these goals, Part II will lay out the methodology of comparative law. My proposal for comparative methodology consists of these steps: Step 1 calls for acquiring the skills of a comparativist. These skills require immersion in the culture under review, linguistic knowledge, and the application of neutral, objective evaluative skills. Step 2 requires the application of these comparative skills to evaluate the external law, which consists of the law as written or stated. Here we must do a close assessment of the similarities and differences of the laws of different countries under review. Step 3 involves applying that same methodology to the internal law, a level of law that lies beneath external law yet has important influences on the formation of law. Finally, in Step 4 the results of comparative investigation are assembled in order to determine what we can learn from the foreign legal system and how that insight might reflect on our own legal system. Part III will then turn to describing and outlining the mission of comparative law. Here the focus will be on employing comparative law methodology to help gain insight into the laws of non-Western countries and solve pressing public policy questions.

II. COMPARATIVE LAW METHODOLOGY

First, it is important to get a sense of comparative law and its methodology. As applied to law, the act of comparison provides insight into another country's law, our own law, and, just as importantly, our own perceptions and intuitions—a self-reflection that can often yield insight

8. Comparative law must be “develop[ed] into a coherent and intellectually convincing discipline.” Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 673 (2002).

into our view of the law. Do we see law as only rules—as commands that channel us along prescribed paths? Do we see law as filtered through the lens of our own law, native predispositions associated with our home territory? Is this a form of cognitive lock-in that colors or even blinds us? This would, of course, be quite natural, as we all reflect our own acculturations. Or do we see law as only illusion? Do we sense a disjunction between law as written versus law as applied or practiced within a given culture? Is there some operative code or hidden formant we are missing that actually drives the pattern of law?

Perhaps we are not accustomed to asking such questions. Most of us are situated within our own native culture, and within that culture we work with the common clay of material that we have grown up with and become accustomed to. We know our own culture well, have learned to appreciate it, and may assume it to be the best. Sometimes we may be right. But we are likely just as often wrong. Inhabiting only our own legal system can be insulating and distorting, which brings us back to comparative law and its purpose. Comparative law offers us avenues by which to access other, foreign patterns of thought and organization different from those familiar to us. We learn a different language, a different legal culture altogether, something we might call different “patterns of order that shape people, institutions, and the society in a jurisdiction.”⁹

Sensing and appreciating the difference of other legal cultures can be enriching. We might sense commonalities in legal systems, such as rules, categories, or patterns of thought or order that resonate across national borders and sit also in our own law. Are there common archetypes embedded within multiple legal systems? If so, what does this mean? Does this lead to a quest for universal principles of law? The pursuit of common principles might form a bridge between different cultures, facilitating mutual cooperation and understanding, and hopefully even a coming together of peoples. But is the quest for universality simply quixotic? Unfortunately, there is often a disjunction between subscribed ideals and behavior actually undertaken. That is the messy reality of law. Law can only do so much. We are still left with the baseness of the common clay of humanity. Does this mean that a legal system is dependent on its own cultural setting? Or do external influences—perhaps transplants from other legal systems—drive a national legal order? Or is it both—that is, does a legal system consist of both internal and external influences? These are all important questions to ask. And they bring us to the purpose of

9. Grossfeld & Eberle, *supra* note 2, at 292.

comparative law: looking to other, foreign legal systems for illumination and insight in the hope that wisdom and understanding are to be gained from both a foreign legal system and our own.

Turning now to the question of methodology, comparative law must have a sound methodology to operate as a legal science. That is my aim in this part of the Article: setting out a sound methodology that can be applied carefully, neutrally, and vigorously so that comparative law can fulfill its mission as a critical legal science. Let me describe the methodology. There are four critical parts to comparative methodology. The first part (Step 1) is acquiring the skills of a comparativist in order to evaluate law clearly, objectively, and neutrally. The second part (Step 2) is the evaluation of the law as it is expressed concretely, in words, action, or orality; we can refer to this as the external law. Once we get an understanding of the law as actually stated, we can move on to the third part (Step 3) of the methodology: evaluating how the law actually operates within a culture. We might refer to this as law in action or the internal law. Law in action is quite important, even to Western culture, as the words in a text often take on a different meaning when applied. Law in action is even more critical for non-Western cultures, whose law may be more a result of tradition, custom, or orality. To evaluate the law's actual operation within a culture, we need to examine the underlying substructural elements within the culture that drive and influence the law. After we have evaluated the law as stated and the law in action, we can assemble our data (Step 4) and conclude with comparative observations that can shed light on both a foreign legal culture and our own. Let us now turn to outlining comparative law methodology.

A. Step 1: The Skills of a Comparativist

Comparative law aims to understand the legal rules and patterns of order that drive a given society. To reach such an understanding, we need to develop critical reasoning skills and apply them in a scientific and neutral manner.¹⁰ Here we need to shed our built-in, native bias or “cognitive lock-in” so that we can review the data objectively. This will call upon us to engage in the exotic: exploring and explaining the

10. See, e.g., JEROME KIRK & MARC L. MILLER, RELIABILITY AND VALIDITY IN QUALITATIVE RESEARCH 10–19 (1986); MATTEI DOGAN & ALI KAZANCIGIL, COMPARING NATIONS: CONCEPTS, STRATEGIES, SUBSTANCE (1994); MATTEI DOGAN & DOMINIQUE PELASSY, HOW TO COMPARE NATIONS: STRATEGIES IN COMPARATIVE POLITICS 3–37 (2d ed. 1990); Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 439, 443 (1985) (suggesting that we need to undertake a critical self-examination).

substructural, underlying forces that influence and form law. For natives of a legal system, this is a question of acculturation. Being a product of a culture, we intuitively sense the hidden forces that play out below the external manifestation of law. But in a foreign culture, fleshing out these hidden forces is more difficult. Here we must call upon the tools of the anthropologist or archeologist: studying the underlying substrata of data that lie within a culture. By employing these skills, we can better understand a foreign culture.¹¹

A comparativist must therefore engage in “cultural immersion,” as Vivian Curran advocates. This technique “requires immersion into the political, historical, economic, and linguistic contexts that molded the legal system, and in which the legal system operates. It requires an explanation of various cultural mentalities”¹² We must also consider the underlying concepts, beliefs, and reasons behind law, what we might call the legal mind or framework of legal philosophy that helps drive and structure law.¹³ Law really cannot be understood without understanding the culture on which it sits. And to understand the culture, we need to employ acute observation, linguistic skill, and immersion in the milieu and social setting. For example, can we really understand the United States Constitution without an appreciation of the influence of the Enlightenment, natural law, or Republican or English Whig theory? Why, after all, do we refer to it as our “higher law?”

Once we have uncovered the cultural context of law, then we can set out the data we have gathered. Here we need to take two approaches to the

11. Reitz, *supra* note 1, at 631–33. As John Reitz observes, a comparativist must understand the forms of legal reasoning and value judgments reflected in the general pattern of legal reasoning. *Id.* at 632. To do this, we need to understand the examined country’s history and “philosophical and religious traditions” and comparativists need “strong linguistic skills and maybe even the skills of anthropological field study in order to collect information about foreign legal systems at first hand.” *Id.* at 631–32. *See also* KIRK & MILLER, *supra* note 10, at 10–19; DOGAN & KAZANCIGIL, *supra* note 10.

12. Curran, *supra* note 4, at 43, 51; Vivian Grosswald Curran, *Dealing in Difference: Comparative Law’s Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 659, 661 (1998) [hereinafter Curran, *Dealing in Difference*].

13. William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to “Rats,”* 46 AM. J. COMP. L. 701, 704–05 (1998). We need to compare law from the interior point of view so that we can see how lawyers think in their own legal system. William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1973–74 (1995). Pierre Legrand calls this the “*mentalité*” of lawyers. *See* Nicholas H.D. Foster, *Company Law Theory in Comparative Perspective: England and France*, 48 AM. J. COMP. L. 573, 616 (2000) (citing Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52, 60ff (1996)); *see also* Nora V. Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 AM. J. COMP. L. 647, 652 (1998) (“Like the study of other religions, comparative law will help us understand how another person conceives of the world and how law contributes to and reflects the culture of a country.”).

culture under study. First, we must assess the data within their cultural context by using the knowledge we have gathered through cultural immersion. After we have carefully considered the law situated in culture, we must step back and distance ourselves from the legal order under review, decanting it like a fine wine, and then turn to a careful assessment of the data.¹⁴ In making this assessment, we must strive for neutrality and a healthy skepticism so that we can view a foreign culture objectively, in an honest and clear way.¹⁵ Here it is important to free ourselves, as best we can, of cultural bias, both with respect to our own culture and the culture under review.¹⁶ A complete cultural immersion or objective evaluation may not be possible, but we must do the best we can.

After we have completed this investigation, we must employ skills of translation: translating one worldview into another. This translation is not easy. We need to be extremely careful here. We cannot assume that an idea or word will translate perfectly from one culture to another. We must recognize the meaning of the idea or word in its own culture, explain its underlying cultural context, and then translate that meaning as best we can to another legal culture, whether our own or a different, foreign culture. Translation calls upon us to explain the underlying context of the culture in which the idea or word is found. It requires understanding the multiple semiotic systems and linguistic contexts that situate ideas, and then determining how to adjust and transfer over that particular worldview into that of another. If we do this well, translation can be a bridge to connect cultures.¹⁷ Or translation can illuminate a disjunction between legal orders. Illuminating either connection or disjunction among cultures can yield valuable insights.

These tools will help us to learn and appreciate that law is not just the words on the page or the chant by the sage. Employing these skills can lead us to new insight and new perspectives on foreign law. By gaining a greater understanding of the underlying socio-philosophic context that both reflects and helps mold law, we can obtain a fuller understanding of law. This more wide-eyed view of law will also lead to new perceptions of traditional views of law as rules, as categories, and as legally enacted

14. DOGAN & PELASSY, *supra* note 10, at 169. We need to be careful not to misinterpret legal phenomena. Demleitner, *supra* note 13, at 647; *see also* Frankenberg, *supra* note 10, at 412 (observing that we need to make a conscious effort to achieve distance from our assumptions).

15. Reitz, *supra* note 1, at 622.

16. Demleitner, *supra* note 13, at 653 (observing that we need to be careful not to be trapped by our own stereotypes and “built-in assumptions about other systems”); *see also* Frankenberg, *supra* note 10, at 412–14 (observing that we need to rethink our own biases and de-center our point of view).

17. Curran, *Dealing in Difference*, *supra* note 12, at 657, 661.

measures. In fact, we can only truly understand law by examining the visible stated law and the substructural, underlying phenomena that form the invisible pattern of law. We can thereby gain a fuller appreciation of law; not just law, but law as it sits within culture. This more comprehensive use of comparative law can offer fuller access to different and alternative patterns of thought.

B. Step 2: Evaluating External Law, As Written or Stated

The essence of comparative law is comparing the law of one country against that of another. The act of comparison requires a careful consideration of the similarities and differences between multiple legal data points, and then using these measurements to understand the content and range of the legal material under observation.¹⁸ To do this, we must look quite carefully at the legal data points under review and assess and understand their content, meaning, and application. Here, our focus will be on external law: law as written, stated, or otherwise made concrete. Words as written are important, but not enough. We must also understand what meaning the words have within the context of the case, statute, or other legal norm. That is, how does the legal rule fit within the broader framework of the legal system?

After we have undertaken the careful evaluation of the legal data points, we must proceed to the next step of comparative methodology: comparing and contrasting the similarities and differences between the legal points under review in the different legal systems. First, we can focus on similarities. How are the multiple data points similar? Is it by word, rule, meaning, application, impact, or some other underlying basis? Or is it because of the context of the legal norm, a functional meaning, or something else? We need to understand the similarities between the legal data points under review. The meaning of words and norms can vary with their setting. What provides the basis for the similarity? What is the meaning of the similarity? How does the similarity translate across legal cultures? These are just some of the questions to pose.

In the next part of Step 2, we must apply the same technique to assessing differences among legal data points. How and in what way are the legal data points different? Is the difference based on words, on context, on functionality, or on something else? What is the concrete

18. As Günter Frankenberg observes, we need to employ a “close attention to detail.” Frankenberg, *supra* note 10, at 412. *See also* Reimann, *supra* note 8, at 686 (stating that we need to observe hard facts).

meaning of the differences? What do the differences reveal? How do the differences translate across legal cultures? Only a close assessment of the legal data points will reveal the underlying differences among legal systems.

Once we have undertaken the systematic study of the similarities and differences between legal data points, we can move on to the next step: exploring the reasons behind these similarities or differences and evaluating their significance within their legal culture.¹⁹ We need to compare and contrast the points so that we can arrive at a fully considered and understood conception of the object under study. We need, then, to record the data points we have considered, outlining their substantive content and then pointing out how they compare and contrast. Once we have recorded the results of our investigation, we can start to pose questions.

For example, why are the legal rules or data points similar or different? What does that reflect—a rule, law, application, or context? How do these factors apply? What are the reasons for the substance of the data point? What does the information tell us about the legal culture? Can we learn something from this? Have we looked only at the law in the books? Is there a difference between the law in the books and the law in action? How do we study the law in action? And by that study can we help fill in the gaps between law in the books and law in action so that we get a fuller study of the law as it actually operates within its legal culture? These are just some of the questions that need to be addressed; I am sure there are others. When systematically applied, Step 2 can uncover the concrete meaning of the legal data point under review. We can then turn to the next step of comparative law methodology.

C. Step 3: Evaluating Internal Law

Turning to the third part of comparative law methodology, we must understand that not all law is external, overt, or otherwise readily identifiable on the surface. A comparativist is like an archaeologist—mining the mass of data from a foreign source in search of uncovering patterns of thought and order that undergird and form a legal culture. The work of the comparativist is, by definition, exotic. After all, it involves studying a legal culture to see by what rules it is run, how these rules function, how effective they are, and how they influence and form the

19. John Reitz makes a similar point in his outstanding article on *How to Do Comparative Law*. See Reitz, *supra* note 1, at 626–27.

culture. We thereby learn much about rules, and just as importantly, we learn about culture. Why are the rules formed this way? Do the rules reflect cultural predispositions? Do the rules influence the culture? What does the culture consist of? How do the elements of the culture influence the law?

To get to the bottom of these questions, we must understand what law is. Many of us think of law as rules, and this is surely part of law. We can look to constitutions, statutes, codes, regulations, cases, or other sources to find concrete statements of rules. We might think of this part of law as law in its external manifestation. External law is the readily identifiable form of law. In the Western tradition, most of external law is written; the power of the written word has a *sola scripta* character—written words convey authority and respect, or so they have come to function within the Western cultural tradition. And Westerners are accustomed to thinking of law as written since the words on the page convey most of the meaning one seeks. We need only read words and then translate their meaning. That is, again, the object of our evaluation in Step 2.

But not all external law is written, stated, or otherwise made concrete. A second, deeper part of law lies beneath the surface and is less visible. These are the underlying forces that operate within a society to help form and influence law and give it substance. We might call this the “invisible” dimension of law. Not that this dimension is wholly unknown or unrecognizable, but more that this dimension of law is one we tend to assume, take for granted or only dimly perceive.²⁰ Or we might think of these invisible patterns as underlying cryptotypes (“the pattern to be revealed”), legal formants (“non-verbalized rule[s]”), or “implicit patterns.”²¹ Alternatively, we might think of this dimension as “substructural, often unarticulated, categorizations.”²² We might refer to this dimension of law as internal—forces that operate beneath the surface of external law, but infuse the law with meaningful content. Examples of internal forces might be custom, history, religion,²³ ethics, geography,²⁴

20. Grossfeld & Eberle, *supra* note 2, at 294.

21. Sacco, *supra* note 3, at 385.

22. Curran, *supra* note 4, at 45.

23. See, e.g., Joachim J. Savelsberg, *Religion, Historical Contingencies, and Institutional Conditions of Criminal Punishment: The German Case and Beyond*, 29 LAW & SOC. INQUIRY 373 (2004).

24. For example, England is an island country, now long merged into the United Kingdom. Due to English isolation, English law formed much of its core on its own, reflecting its traditions. By contrast, France is part of continental Europe. Thus, France looked more frequently to its fellow Europeans for borrowings. For example, “the *société à responsabilité limitée* . . . was imported almost wholesale from Germany, partly in response to the wishes of the business community to have an

language, philosophy,²⁵ interpretation, or translation. There is a deeper dimension to law than that which manifests itself overtly. We must pay close attention to law in all of its manifestations.

We all have a tendency to seize upon the readily identifiable aspects of the law and ascribe meaning to them. That approach is, however, a mistake. The internal dimension of law can exert powerful meaning on legal culture. We need to look at law fully and consider all of its aspects so that we can reach a better understanding of how law actually functions within a society. Law, of course, is like a language; in reality, it is a legal language. But as with a foreign language, in order to understand it truly, we must understand the cultural context on which it sits and which helped form it. Only then can we translate accurately true meaning from one legal system to another.²⁶

equivalent to the English private company.” Foster, *supra* note 13, at 613–14; *see also* Ewald, *supra* note 13, at 702 (“[T]he relevant ‘context’ [might include] the economics of the society, or its political structure, or social arrangements, or even (as in Montesquieu) its geography and climate.”).

25. French legal thought, for example, often reflects the Cartesian method of breaking an argument into two segments. Foster, *supra* note 13, at 604. There is a “greater place of theory and categorization in French legal thinking and the construction of a typical Cartesian, dualist [framework] . . . as opposed to the lack of importance accorded to theory in English law . . .” *Id.* at 616. Of course, this would make sense, as René Descartes is French. English common law, in contrast, is based on practical solutions given the exigencies of the case.

Similarly, law and economics has had a major influence on contract and antitrust law in the United States. Given some of the strong similarities between the laws of the United Kingdom and United States, law and economics may influence English law as well. *Id.* at 619. However, law and economics has not had much of an impact on continental European countries, reflecting deep underlying structural differences in culture. *See, e.g.*, Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT’L & COMP. L. REV. 295 (2008).

26. Translation of legal concepts from one country to another can be difficult. For example, consider the observations made by Nicholas H.D. Foster. Foster, *supra* note 13. Specifically, consider his observations on the various terms for corporations. Older English used the term “corporation,” which is the common usage in North America. But more modern terminology uses the term “company” as the general term for business organizations. In France, the usage is “*société*,” although in old French law, the term was “*compagnie*.” *Id.* at 578. Likewise, the English term “contract” “is far from co-terminous with French ‘*contrat*.’” *Id.* at 596. As Professor Foster observes, it is hard to find an exact equivalence between legal ideas. *Id.* at 578. For example, comparing corporate governance in England and the United States—two countries with many shared traditions—reveals significant differences, “principally residing in the lack of a United Kingdom counterpart to the United States tension between notions of centralizing, bureaucratic control, and democratic freedom.” *Id.* at 617. As Reitz observes:

Here the comparatist comes face to face with the enigma of translation. In one sense every term can be translated because there are things in each legal system that are roughly the functional equivalent of things in the other legal system. In another sense nothing can be translated because the equivalents are different in ways that matter at least for some purposes. At a minimum, generally equivalent terms in each language often have different fields of associated meaning, like, for example, “fairness” and “*loyauté*.”

Reitz, *supra* note 1, at 620–21. *See also* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO

The cultural context of law can be quite complex. Law sits on the surface of culture, is vested with meaning by the culture, and, in turn, vests the culture with meaning. Accordingly, we must look at it in a more complete way as (1) external law, (2) internal law, and (3) the culture on which law sits. We are not studying just law, but legal culture as well. The study of law is as important as the study of culture. Only in this way can we obtain a more complete view of law, allowing us to gain truer understanding.

D. Step 4: Determining Comparative Observations

The final step in comparative law methodology is assembling the results of our investigation. Here we must focus on the legal data points under review. What is the significance of the data? What have we learned? Has our investigation of a foreign legal system shed light into its operation and meaning? Can we now understand it better? What has the foreign system taught us? These are probably some of the most important questions to ask.

The results of comparative observation are likely to be our window into the world of the foreign culture. But, importantly, a look at a foreign culture is just as likely to shed light on our own legal culture. In effect, we are holding ourselves up to a mirror. How do the rules of our culture operate? How do our rules compare to those of a foreign system? Is there something in the foreign culture that can benefit or lead to improvement of our own system?²⁷ Or, upon reassessment, do we conclude that our system operates effectively?

These will not be easy questions to answer. Much will depend on the similarities and differences in the legal systems under review. For example, let us draw upon constitutional law. We will use structural governmental issues like separation of powers as a starting point. In the United States, separation of powers at the federal level consists of dividing government into three separate but equal branches of government (legislative, executive, and judicial). In European countries, separation of powers is quite different. As in the United States, power is divided between legislative, executive, and judicial branches. However, the

COMPARATIVE LAW (1993); Reimann, *supra* note 8, at 678 (stating that legal transplants assume new meaning in a different culture).

27. MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 9 (2d ed. 1994) (stating that comparative law can lead to “promoting an improved understanding of one’s own legal system or searching for principles common to a number of legal systems”).

common European form consists of parliamentary democracy, with the Prime Minister or Chancellor serving as both a member of Parliament and the leader of the government. That is, the Prime Minister is part of both the legislative and executive branches. This would be the case, for example, in the United Kingdom, France, and Germany. In the United Kingdom, in accord with English tradition, the King or Queen is the titular head of all three branches of government—legislative, executive, and judicial. Further, the judiciary is not always truly independent in the sense of being able to rule whether acts of governmental bodies are constitutional. This would be the case in the United Kingdom and France, although the French *Conseil Constitutionnel* has, since 1971, been moving toward a role of independent judicial review.²⁸ And, finally, most European countries are subject to the *supranational* law of the European Union and the European Convention on Human Rights. Thus, in comparison to the United States, most European countries are subject to two legal orders, national and supranational. Thus, the European form is not an easy fit with that of the United States. There are significant differences that need to be examined and considered carefully and then explained to see, for instance, whether understanding or transplanting a rule will actually work.²⁹ This is not to say that important insights could not be gained through comparison. But the translation of law from somewhat different legal structures can be a challenge, requiring thorough investigation and explanation.

Contrast this example now with issues of fundamental rights. Take freedom of speech, for example. In the United States, free speech is textually protected without limitation, leading to a more absolutist approach.³⁰ Yet, of course, the Supreme Court does limit free speech if, under standard methodology, a clear and present danger—or, now, imminent harm—is present.³¹ By contrast, in most European countries, freedom of speech is protected, but with explicit textual limitations.³²

28. JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, *PRINCIPLES OF FRENCH LAW* 147–56 (1998).

29. Sometimes a transplant does not work. One example is the attempt by Italy to transplant the United States adversary model in matters of criminal justice, as documented by Elisabetta Grande. Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 *AM. J. COMP. L.* 227 (2000).

30. The First Amendment Free Speech provision provides: “Congress shall make no law . . . abridging the freedom of speech” U.S. CONST. amend. I.

31. For example, advocacy of violence can be regulated, under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

32. For example, the 1950 European Convention for the Protection of Human Rights and

Germany's constitution lists express limitations on freedom of expression,³³ as does Canada's,³⁴ which tends more to follow the European approach.

Let us focus on obscenity as a form of expression. Interestingly, the constitutional provisions explicitly addressing obscenity as a form of expression do not mean that obscenity is uniformly treated as protected speech in the United States, Germany, and Canada. In the United States, obscenity is unprotected speech under the definition set forth in *Miller v. California*.³⁵ By contrast, obscenity is generally protected speech in

Fundamental Freedoms, of which most European countries are members, guarantees freedom of expression as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, Europ. T.S. No. 5.

33. The full text of the Basic Law for the Federal Republic of Germany, article 5, provides as follows:

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

(3) Art and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, as amended, art. 5(3), translation available at http://www.bundestag.de/interakt/infomat/Fremdsprachiges_material/downloads/ggEn_download.pdf.

34. Under the Canadian Charter of Rights, freedom of expression is guaranteed as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

35. *Miller v. California*, 413 U.S. 15 (1973) (revising *Roth v. United States*, 354 U.S. 476 (1957) and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S.

Germany in so far as it does not violate the core norm of dignity or threaten youth.³⁶ Likewise, obscenity is mainly protected in Canada unless it demeans women or portrays violence.³⁷ Comparatively, we can learn a lot from this example. Despite textually different treatment of freedom of expression—no textual limitation in the United States in contrast to textual limitations in Germany and Canada—obscenity is unprotected speech in the United States, whereas it is largely protected speech in Germany and Canada. Why is this the case?

In the United States, is it because something lies beneath the written law that helps drive its formation? Is it morality, religion or a sense of ethics? We would need a deep investigation of these underlying cultural aspects to reach a solid conclusion. Summarily stated, religion and its influence on moral standards are the most plausible explanations for the regulation of obscenity in the United States.³⁸

413 (1966) (plurality opinion), which had put a gloss on the definition of proscribable obscenity). Under *Miller*, obscenity must meet these standards to be considered unprotected speech:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (citations omitted).

36. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 27, 1990, 83 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 130 (F.R.G.).

37. See, e.g., *R. v. Butler*, [1992] 1 S.C.R. 452, 484 (Can.) (declaring that unprotected obscene speech is “(1) explicit sex with violence, [or] (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing,” but that “explicit sex without violence that is neither degrading nor dehumanizing” is protected speech). *Id.*

The portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.

Id. at 454. For an overview of Canadian obscenity law, see Grant Huscroft, *The Constitutional and Cultural Underpinnings of Freedom of Expression: Lessons from the United States and Canada*, 25 U. QUEENSLAND L.J. 181 (2006); Kathleen Mahoney, *Obscenity and Public Policy: Conflicting Values—Conflicting Statutes*, 50 SASK. L. REV. 75 (1985–1986); Kathleen E. Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 LAW & CONTEMP. PROBS. 77 (1992).

38. Christianity is most likely the driving influence in the regulation of obscenity in Western cultures. In the pre-Christian era, Greece and Rome tolerated rampant obscenity, which was considered a natural aspect of culture in that era. The Roman-led movement toward Christianity instigated the regulation of obscenity. According to Christian values, sex should occur only as a means of reproduction. Otherwise, sex is considered sinful. See, e.g., Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT’L L. 299, 304–06 (2008); Kevin W. Saunders, *The United States and Canadian Responses to the Feminist Attack on Pornography: A Perspective from the History of Obscenity*, 9 IND. INT’L & COMP. L. REV. 1, 18–19, 21–22, 25 (1998–1999).

In Germany, the constitutionally protected status of obscenity would seem to reflect the supreme valuation of a human being *qua* human being. That is, people should be free to express themselves as a constituent element of their personality, itself a reflection of human dignity, the core animating value of the Basic Law. Limitations can, most likely, only curtail obscenity if it violates the core underlying philosophic ideal of the German constitutional order, human dignity, or the textual limitation of article 5(2) of “the protection of young people.”³⁹ For example, human dignity could be violated if the expression depicts violence or demeans a human being. Treating a person as an object and not a human violates human dignity. Otherwise, access to obscenity is left to the choice of people on the idea that sex is a natural part of human life and, therefore, an integral aspect of human autonomy and personality.⁴⁰

Canada seems to follow the European model. Freedom of expression there is a core element of the underlying dignity of human beings. Limitations on obscenity are allowed when the expression depicts violence or demeans people, no matter what gender, on the grounds that people are to be treated as of equal worth. Canada has also moved away from the community standards norm that is present in the United States,⁴¹ and, like Germany, has jettisoned morality as a basis for regulation.⁴² Instead, it has moved to a standard based on harm, mainly relating to the demeaning of women.⁴³

At the founding of the United States, obscenity was treated as the religious offense of blasphemy. Boyce, *supra*, at 312. Victorian prudery was a major influence in the United States and Canada. *Id.* at 302. After the Civil War, starting in the 1870s, Andrew Comstock led the movement for passage of federal obscenity legislation that suppressed sex speech. *Id.* at 313. While some of the religious fervor leading to regulation of obscenity has waned, still one of the essences of obscenity regulation is the “appeal[] to the prurient interest,” *Miller v. California*, 413 U.S. 15, 24 (1973), that is, the triggering of a sexual response. The sex act is still at the core of obscenity regulation.

39. Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] art.5, translation available at http://www.bundestag.de/interakt/infomat/Fremdsprachiges_material/downloads/ggEn_download.pdf.

40. Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. J.L. REFORM 201, 216, 221, 229, 243 (1987–1988). Since the 1974 law liberalizing obscenity, graphic sex material has become widely available unless it depicts extreme violence or endangers youth. *Id.* at 212. The law prohibits “extreme hard-core pornography [which encompasses] sex-related violence, sexual acts by or on children, and sexual acts of humans with animals.” *Id.* at 216. “[N]otions of sexual morality or decency [are not] a sufficient ground for regulation.” *Id.* at 217.

41. *Miller*, 413 U.S. at 24. Under Canadian law, the community standard was applied on a national level, as was done in *Roth v. United States*, 354 U.S. 476 (1957), in contrast to the local community standard norm set forth in *Miller. Butler*, 1 S.C.R. at 479–80, 492, rejected the community standard. Boyce, *supra* note 38, at 301, 335–36.

42. Boyce, *supra* note 38, at 331.

43. *Id.* at 335–36, 338. Under *Butler*, harm is mainly viewed as the degradation of women. *Id.* at

In sum, we seem to see different underlying bases for the treatment of obscenity. In the United States it is most likely morals and religion, in Germany it is most likely the underlying philosophic ideal of human dignity, and in Canada it is most likely a concern for dignity and equality⁴⁴—a constitutional norm that competes with freedom of expression. Thus, among these three Western countries, the United States stands apart from the more closely aligned Canada and Germany. Interestingly, Canada and the United States are linked closely by geography and strong elements of culture. Yet, constitutionally, they differ in important respects, including obscenity. By contrast, Germany shares more common geographic and legal ties to other members of the European Union, similarities which extend to the treatment of obscenity.

The example of artistic expression seems to be a more pertinent fit. In the United States, there is, again, no textual limitation of free speech, including artistic expression, which is considered core speech.⁴⁵ In Germany, by contrast, artistic expression is textually set out in absolute, unlimited terms.⁴⁶ Thus, both countries treat artistic expression as core speech. The main difference, again, is that art is not mentioned in the United States Constitution, whereas it is signaled out in the German Basic Law. Thus, here the object of study—art speech—is accorded a quite similarly high level of constitutional protection in both countries.

Now, a word about what we might learn from this investigation. Germany lays out a clear definition of what comprises artistic

338. According to *R. v. Labaye*, [2005] 3 S.C.R. 728, 753–54 (Can.), the harm must be “objectively” shown “beyond a reasonable doubt” and be so great as to be “incompatible with the proper functioning of society.” Specifically, “[t]he causal link between images of sexuality and anti-social behaviour cannot be assumed,” rather “[it] must be proved.” *Id.* at 751–52. No study has yet shown that correlation. Boyce, *supra* note 38, at 363.

44. As stated by the Court in *Butler*,

The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.

Butler, 1 S.C.R. at 493–94 (citations omitted); see also Boyce, *supra* note 38, at 331.

45. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (“[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection.”).

46. “Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.” Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, as amended, art. 5(3), *translation available at* http://www.bundestag.de/interakt/infomat/Fremdsprachiges_material/downloads/ggEn_download.pdf.

expression,⁴⁷ and a significant body of German case law has developed elucidating the concept.⁴⁸ By contrast, the United States Supreme Court has not, as yet, come up with a clear definition of art speech. Nor is there a sophisticated body of case law on artistic expression in the United States. So could the United States learn much on this subject from Germany? What is art speech? What are the reasons as to why it should be treated as core speech? Does the difference between judging art speech under the United States' content-based rules, resulting in application of strict scrutiny, content-neutral rules, and then intermediate or rational basis scrutiny, lead to limitation of art speech?⁴⁹ What does this reveal? Is the basis for the stronger regulation once again morality or some unspoken intuition? If so, does this reveal different underlying values? Is the United States more concerned with a set of ethical norms to guide behavior in contrast to the German focus on the development of human personality?

III. THE MISSION OF COMPARATIVE LAW

We can now turn to the last part of our assessment of comparative law: its mission. In this respect, comparative law provides a different perspective on law, as do the range of disciplines that have arisen in the last thirty years. Law and economics, for example, teaches us to appreciate and evaluate the economic and practical efficiency of law and its rules.

47. The essential characteristic of artistic activity is

the artist's free and creative shaping of impressions, experiences and events for direct display through a medium of a specific language of shapes. All artistic activity is a mix of conscious and unconscious events that is not rationally orderable. Intuition, phantasy and artistic understanding all effect artistic creation, this act of creation is primarily not informational but rather an immediately direct expression of the individual personality of the artist.

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 24, 1971, 30 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 173 (188–89) (F.R.G.). The German Constitutional Court was construing the express protection of art as expression under article 5(3), which provides that “[a]rts and sciences, research and teaching shall be free.” The Court determined that Klaus Mann’s novel, *Mephisto*, defamed its implicit subject, a German actor (and former brother-in-law of Mann) who achieved fame by hitching his star to the Nazi government, an act that Mann analogized to Mephisto making a bargain with the devil.

The Court’s holding would seem to contradict the fundamental tenets of artistic expression. However, the Court relied on a person’s right to protection of honor, rooted in personality rights, including reputation, to support its ruling. Personality rights can sometimes trump expressive rights.

48. *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 17, 1984, 67 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 213 (F.R.G.) (expanding the definition of artistic expression).

49. *See, e.g.*, Nat’l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (holding that the NEA can set conditions for federal art grants, denying public funding for homoerotic photographs by Robert Mapplethorpe or provocative sexually explicit performance art by Karen Finley on the basis that these forms of art are indecent).

Critical Legal Studies and its vast genre teach us to learn and appreciate the power relationships (economic, racial, gender-based, immigrant, or other) embedded in a law or its rules. Law and literature teaches us the power and complexity of language in shaping legal data. Words, their syntax, grammar, style, and the like convey the particular context in which words sit and form meaning. As Rodolfo Sacco observes, “Our visible, superficial language is the result of identifiable transformations of latent linguistic patterns that are more permanent than the visible ones.”⁵⁰ Indeed, we should be careful to heed such lessons of post-modernism and post-colonialism; by applying the rubrics of legal science as situated within our own cultural setting, are we missing, glossing over, or distorting the wonderfully unique aspects and structures of individual societies, especially societies and cultures outside dominant worldviews? Is comparative law itself—as a Western-oriented field—an imposition of power on undeveloped or developing countries or their indigenous populations?⁵¹

Employing the insights of other fields, such as anthropology, philosophy, linguistics, sociology, and history, has much to offer us in understanding law. In particular, we benefit from the skill of decoding the effect of forces entrenched within law, helping to uncover the framework on which law sits. Decoding is an essential part of the work of comparative law: discovering and translating the invisible powers in a legal culture leads to uncovering the patterns of order that actually operate within a society and yield content. We must, of course, be careful to see and understand the elements that actually exist and operate within a given society, as ordered by that society, and not, as we more naturally tend to, view them through our own cultural perspectives. We must learn to be foreign sojourners, shedding our natural predispositions, and adopting an eyes-wide-open perspective—the ways of the archeologist or anthropologist, not just the ways of a legal scholar.⁵²

These insights lead us back to comparative law. Comparative law is a quest for the exotic, the different, the other. It examines the dimensions and forms of law and culture outside the normal ken of one’s visage in the hope that one can gain new and different perspectives on law, culture, and patterns of order. Equally important, comparative law ultimately focuses back on local culture: it asks, by comparison, is our culture better or worse; in what way; and if so, what is to be done? The real aim of

50. Sacco, *supra* note 3, at 385.

51. Email from Jayanth Krishnan to author, Sept. 30, 2006 (on file with author).

52. KIRK & MILLER, *supra* note 10, at 32–46.

comparative law is to offer insight and perspective so that we are better equipped to reflect critically about ourselves and our own legal culture. Comparison can help us assess where we came from, where we are, and where we go from here. By making this kind of comparison, we obtain some perspective about whether we are what we want to be, or how we can find a way to be all that we would like to be.

To accomplish these goals of comparative law, I advocate the open-eyed approach to viewing law discussed above. First, and most fundamental, is the language. A language is the expression of a worldview. Only by understanding language can we realize the substance of the legal data. To translate language, we must understand and give meaning to the words, ideas, and concepts of one language, and transmute them to another. Some of this may easily be done by translating words from one semiotic system to another. But much of this is harder than literal translation. To understand words we must understand and decode the unspoken contexts, assumptions, and archetypes of a culture. This is the harder work of translation: rendering the socio-cognitive context so that the particular cultural prism of one culture can truly be conveyed to another. Here we must also learn to appreciate the range and effect of the forces that operate on law and help form legal culture.⁵³ Through language, as an example, we can observe the open-eyed approach in action. The first level of law is its external manifestation in words: codes, statutes, cases rules, orality, and the like. But the words are simply the external manifestation and expression of ideas that sit within a culture.

Second, we must also look beneath the words to the underlying subsurface of forces that vest words and legal culture with meaning. We have observed this exercise with respect to translation: identifying and conveying the socio-cognitive context of words. But the exercise of excavating the substructure of legal culture goes much deeper than that, as we have observed. We must examine the full range of forces that lie beneath the external law and vest it with meaning. This involves an examination of forces like religion, history, sociology, economics, and the like. Only then can we convey the fuller picture of a worldview of law.

We must also reconsider the mission of comparative law. Generally, comparative law, as we have come to know it in the Western world, has

53. For a discussion of comparative law as translation, see, e.g., BERNHARD GROBFELD, KERNFRAGEN DER RECHTSVERGLEICHUNG [CORE QUESTIONS OF LEGAL COMPARISON], *translated in* COMPARATIVE LAW: AN INTRODUCTION 31 (Vivian Grosswald Curran ed. & trans., 2002); Vivian Grosswald Curran, *Cultural Immersion*, in COMPARATIVE LAW: AN INTRODUCTION 38 (Vivian Grosswald Curran ed., 2002).

focused primarily on Western culture, usually the legal systems of North America and Europe and their migration to other countries, often former colonies. The main focus here started with private law, but now, in the last fifteen years or so, it has also focused a lot on public law, mainly constitutional and international public law.⁵⁴ This mission should continue. But we also need to open our vistas. At least two other missions merit significant attention.

First, we should take bigger steps outside Western culture and focus on the legal systems or patterns of legal thought present in non-Western countries or peoples. For example, older societies relied on orality, ritual, or tradition to convey meaning, respect, rules, and regulation. This was the custom among many native peoples in the Americas before their status was relegated to that of “domestic dependent nations.”⁵⁵ Many indigenous peoples still focus on oral customs, and hopefully

the evolution of national legal awareness of the need for a contemporary society to provide reliable political, economic, cultural and social security safety nets for its indigenous people has contributed in no small measures to the growing international consciousness of the imperative necessity to protect the precious cultures, traditions, ways of life and civilizations of every indigenous people in the world.⁵⁶

Their “cultures, traditions, ways of life and civilizations . . . must be preserved intact as distinct but unique social, cultural, political and economic grouping within the same national community.”⁵⁷

[T]he study of comparative law is vital to the basic understanding of international legal developments. . . . [T]he use of comparative

54. See, e.g., MARK KENDE, HUNTER RODNEY CLARK, LORRAINE WEINRIB, VIKRAM RHAGAWAM, DONALD DOMMERS & EDWARD J. EBERLE, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* (forthcoming); NORMAN DORSEN, MICHEL ROSENFELD, ANDRAS SAJO & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2003); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2006); Edward J. Eberle, *Comparative Public Law: A Time That Has Arrived*, in *FESTSCHRIFT FÜR BERNHARD GROBFELD* (1999).

55. Sompong Sucharitkul, *The Inter-temporal Character of International and Comparative Law Regarding the Rights of the Indigenous Populations of the World*, 50 AM. J. COMP. L. Supp 3, 15 (2002) (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)); see also Robert D. Cooter & Wolfgang Fikentscher, *American Indian Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29 (2008) (explaining that American Indian tribes mainly set down law in codes transmitted by orality and tradition; these codes were not written down until the 1960s.).

56. Sucharitkul, *supra* note 55, at 3–4.

57. *Id.* at 3.

law techniques can serve to promote, reinforce and accelerate the process of crystallization of emerging norms of international law designed to preserve and protect the political, economic, social and cultural values of indigenous peoples populating the earth.⁵⁸

Nonwritten methods can be effective in forming and regulating legal culture. While such techniques might be used in Western countries, they are more prevalent in non-Western countries. For example, despite the pell-mell passage of a plethora of written statutes designed to embrace the global marketplace, Chinese norms are still most likely regulated by the customs and teachings of Confucius or other traditional authority. We might say the same of Japan: order and harmony are prime ingredients of Japanese culture, a legacy also of Confucianism, and this focus holds an important influence over legal relations.⁵⁹ Confucian norms are also a major influence in Korea,⁶⁰ although their influence here should come as no surprise, given Korea's geographic proximity to Japan and China. In contrast, consider modern India, another emerging global economic powerhouse. India is certainly pursuing a course of modern economic development, along the lines of China. However, sociologically, classic Hindu law yet provides the underlying structure of social ordering. Debate continues over the extent to which classic Hindu law helps perpetuate the socio-legal-based caste system that pervasively channels social behavior.⁶¹ As with China, progress is proceeding along Western-oriented economic planes, but not in other respects, as measured from a Western criterion (itself a potentially distorting lens).

If we are concerned about evaluating global country power relationships and their impact on legal systems, then we need a deeper focus on the emerging major players, such as China and India, or Japan—already a major world player. The emergence of the United States in the post-World War II era led to the emergence of English as the *lingua franca* of the world and the export of important American legal ideas and institutions. Global dominance and power often leads to global influence, as with the Roman Empire's export of Roman law and England's

58. *Id.* at 3–5.

59. Danian Zhang & Kenji Kuroda, *Beware of Japanese Negotiation Style: How to Negotiate with Japanese Companies*, 10 NW. J. INT'L L. & BUS. 195 (1989).

60. Ilhyung Lee, *Korean Perception(s) of Equality and Equal Protection*, 31 B.C. INT'L & COMP. L. REV. 1 (2008).

61. Emails from Professor Jayanth Krishnan to author (Aug. 13, 2008 & Sept. 30, 2006); see also Donald R. Davis Jr., *Traditional Hindu Law in the Guise of 'Postmodernism': A Review Article*, 25 MICH. J. INT'L L. 735 (2004).

Commonwealth colonization that introduced the common law to major areas of the world, including North America and India. Now, we might ask, could China or India exert the same global influence? How would this change the world?

A number of scholars have taken the path of opening up windows to non-Western legal orders. Jayanth Krishnan has focused on India, evaluating the problem of outsourcing and globalizing the legal profession,⁶² assessing the impact of globalization on the political, economic, and social landscapes of the developed and undeveloped world,⁶³ and evaluating how successfully American legal institutions have been exported abroad,⁶⁴ among other topics. Richard Oppong has assessed the state of private international law in Africa;⁶⁵ Chris Okeke has evaluated Africa's mineral resources;⁶⁶ and George Nnona has written about Nigerian investment and choice of law, among other topics.⁶⁷ Sompong Sucharitkul has focused on indigenous peoples and Asian nations in the Far East.⁶⁸ A number of scholars are focusing on Islam, an especially important topic in the world today.⁶⁹ And Bernhard Grossfeld and Josef Hoeltzenbein have taken a look at Australian aborigines.⁷⁰ We might also consider approaches that focus on particular countries, legal systems, or regions of the world.⁷¹ These are just some of our portals to other lands.

62. See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189 (2007).

63. See Jayanth K. Krishnan, *Analyzing the Friedman Thesis Through a Legal Lens: Book Review Essay Assessing Thomas L. Friedman's The World is Flat*, 81 TUL. L. REV. 923 (2007).

64. See Jayanth K. Krishnan, *From the ALI to the ILL: The Efforts to Export an American Legal Institution*, 38 VAND. J. TRANSNAT'L L. 1255 (2005).

65. See Richard Frimpong Oppong, *Private International Law in Africa: The Past, Present, and Future*, 55 AM J. COMP. L. 677 (2007).

66. See Chris Nwachukwu Okeke, *The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?*, 42 INT'L L. 193 (2008).

67. See George Nnona, *The Nigerian Investment and Securities Act: Delineating Its Boundaries in Relation to the Registration of Securities*, 50 J. AFR. L. 24 (2006); George Nnona, *Choice of Law in International Contracts for the Transfer of Technology: A Critique of the Nigerian Approach*, 44 J. AFR. L. 38 (2000).

68. See Sucharitkul, *supra* note 55; Sompong Sucharitkul, *Thai Law and Buddhist Law*, 46 AM. J. COMP. L. SUPP. 69 (1998); Sucharitkul, *supra* note 7; see also John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing Asia*, 40 N.Y.U. J. INT'L L. & POL. 657 (2008).

69. See, e.g., Jennifer F. Cohen, *Islamic Law in Iran: Can It Protect the International Legal Right of Freedom of Religion and Belief?*, 9 CHI. J. INT'L L. 247 (2008); Intisar A. Rabb, "We the Jurists": *Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527 (2008); Ossama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT'L L. 303 (2008).

70. See Bernhard Grossfeld & Josef Hoeltzenbein, *Poetic Legal Dreams: Cross-Cultural Pioneers*, 55 AM. J. COMP. L. 47 (2007).

71. See Reimann, *supra* note 8.

Second, we must start employing the science of comparative law to help solve problems that transcend national borders. In our increasingly globalized world, we are all faced with common sets of problems to solve. We need to focus on big policy questions so that these questions can be evaluated from a different perspective. Comparative law has much to offer here.

Consider some examples. First, let us examine antitrust law. In the United States, antitrust law has moved significantly toward the goal of protecting consumer economic interests. It aims to structure the market so as to maximize benefits to consumers, focusing on the lowest pricing possible.⁷² Bigness or market dominance by firms can help drive prices lower. In part, this reflects a deregulatory approach. By contrast, the European analog to antitrust law, competition law, is most concerned with protection of the interests of competitors in a given industry and with protection of consumer safety and well-being. For Europeans, bigness is a danger; it may mean that large competitors will drive smaller firms out of business and thereby be in a position to exploit consumers.⁷³ Europeans are concerned that consumers will be misled.⁷⁴ For Europeans, competition law is a question of protecting integral parts of the society: the economy and consumers.⁷⁵ The European approach is much more proactive in

72. James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340, 371–72 (2007).

73. *Id.* at 373. An important example is Microsoft. In the United States Microsoft was able to settle its antitrust suit, which involved tying its web browser (Internet Explorer) to its operating system (Windows), under a consent decree in 2002. But the litigation in Europe went on for quite some time, with Microsoft finally having to settle. For an analysis of the Microsoft antitrust litigation, see Amanda Cohen, *Surveying the Microsoft Antitrust Universe*, 19 BERKELEY TECH. L.J. 333 (2004). At bottom, this, too, reflected a difference in approach to antitrust law. The Microsoft argument for “consumer economic welfare” simply will not work in Europe. Again, American law is pro-competition and oriented toward economic efficiency, whereas the European Union is also interested in being pro-competitor, assuring the integrity of the market. Whitman, *supra* note 72, at 373–74. Economic efficiency, consumer welfare, and market integration are major goals of European antitrust law, too, but these can only follow from assurance of the integrity of the market being open to all players. *See, e.g.*, Andreas Kirsch & William Weesner, *Can Antitrust Law Control E-commerce? A Comparative Analysis in Light of U.S. and E.U. Antitrust Law*, 12 U.C. DAVIS J. INT’L L. & POL’Y 297 (2006); Jason M. Sullivan, *European Union Antitrust Enforcement: A Distinct Prosecution or a More Principled Approach?*, 15 TRANSNAT’L L. & CONTEMP. PROBS. 457 (2005). European law

seeks to protect consumers and small firms from the aggregation of power into the hands of a few firms, or even one large firm. The fears behind this motive are that consumers need to be protected not only from increased prices and lower quality that may result from less competition, but also from threats to political power and democracy that may result from large aggregations of economic power in the hands of the few.

Id. at 471 (citations omitted).

74. Whitman, *supra* note 72, at 380.

75. *See, e.g.*, Aditi Bagchi, *The Political Economy of Merger Regulation*, 53 AM. J. COMP. L. 1 (2005). Aditi Bagchi observes that the United States follows a consumerist model for antitrust,

enforcing antitrust law to accomplish these goals, intervening when necessary to protect the operation of the market, society, and local culture.

Antitrust law raises important questions. What is more important: consumer economic interests or consumer welfare, including the safety and security of goods purchased and full and fair dissemination of information so that consumers will not be duped? How do we want the economy to operate? Do we want market dominance, which might initially lead to low prices but eventually facilitate market capture? Or, do we want a free and open playing field for all? Should fairness for consumers and market players and avoidance of market manipulation be the goal?

Another important, related issue concerns consumer protection and the operation of markets. A look into United States versus European approaches offers important perspectives. The United States' economy is consumer driven.⁷⁶ The main focus of this model of consumer protection is economics; its aim is therefore that consumers will benefit from the low prices caused by a competitive market. The idea here is that the consumer is sovereign and with a wide availability of goods at different prices, the consumer will choose based on consideration of price or quality.⁷⁷ The United States model is based, quite simply, on "consumer economic interests."⁷⁸

By contrast, the European model (focusing mainly on Germany and France) is more concerned with consumer protection. While the American model is concerned with economics and competitive pricing, the Europeans tend to be more concerned with protection of the markets and protection of consumers. Protection of the markets follows what James

employing the philosophy of law and economics in order to produce goods at the cheapest prices. *Id.* at 2. The European Union rejects this philosophy, as the EU is more concerned about maintaining the integrity of the European economy, and avoiding market dominance by any one firm. *Id.* at 2–3. In the past, the American antitrust model employed the producerist model outlined by James Whitman as a way to protect integral elements of the economy. Whitman, *supra* note 72, at 345–46; Bagchi, *supra* note 75, at 3. In part, this reflected more of a state-by-state approach, as local governments wanted to protect their native industries. Bagchi, *supra* note 75, at 3. But with the increasing nationalization of the United States economy, control shifted toward the federal government, which now rules the antitrust field. *Id.* at 24. The resulting federal policy often employs the Chicago School approach of law and economics. *Id.* at 3. Bagchi concludes, like Whitman, that the United States' economy is consumer-oriented, and that Europe's is producerist or antidominance-oriented. *Id.* at 4–5; Kirsch & Weesner, *supra* note 73, at 308 ("A radical Efficiency Model has not been applied in the E.U., and generally E.U. antitrust law is more interventionist than U.S. antitrust law.")

76. Whitman, *supra* note 72, at 399.

77. *Id.* at 346. For instance, "[m]any American firms use loss leaders in order to draw consumers into their establishments, in the hope they will buy more profitable goods. . . . For example, large appliance retailers such as Circuit City can sell appliances at or below cost, because they can make money by inducing consumers to buy warranties." *Id.* at 377.

78. *Id.* at 399.

Whitman calls a “producerism” model, in which a “producer” is “any actor who provide[s] some factor in the production and distribution of goods and services.”⁷⁹ The concern here is with assuring that the market for goods will survive, notwithstanding the onslaught of competition. The second objective is the protection of consumers. Here the concern is that consumers will not be duped into buying shoddy goods, which, of course, would usually be priced below market.⁸⁰

An analysis of these two models indicates different root assumptions. In the United States, emphasis is placed on money and freedom of choice for consumers. Each consumer bears the burden of gauging his or her own best interests. In Europe, the focus is on creating stable markets for the preservation of society and the security of citizens acting as consumers. Can Americans or Europeans learn from the other? Should the free market order our affairs, as in the United States? What does this mean? Does it mean money should rule? If money rules, then will the marketplace become a stage for the survival of the fittest, those who are most energetic, driven, greedy, or egomaniacal? Or is some form of state protection necessary to assure a free-flowing economy, as in Europe? Might some state paternalism (an idea despised by Americans) help secure a free market economy, while safeguarding citizens’ welfare? Would the European approach have helped prevent the United States housing collapse, caused in significant part by predatory mortgage practices?⁸¹ Economically, would the European approach have ended up saving Americans far more money? And today, would some governmental regulatory infrastructure have helped prevent the current credit crisis and the resulting economic recession? Certainly here we can learn much from one another.⁸²

79. *Id.* at 366.

80. As Whitman observes:

[O]ver the last thirty years, American antitrust law has moved strongly in the direction of protecting the economic interests of consumers through fostering competition. According to standard American antitrust analysis, markets ought to be structured in such a way as to maximize benefits to consumers, and in particular to guarantee the kind of competition that yields the lowest possible prices. . . . Europe has long differed from the United States. As Americans see it, the European tradition has sought to protect competitors rather than consumers—as Americans would say, “We protect competition, you protect competitors.”

Id. at 372–73 (citation omitted).

81. Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Beyond Subprime Loans*, N.Y. TIMES, Feb. 12, 2008, at A1; Robert J. Shiller, *How a Bubble Stayed Under the Radar*, N.Y. TIMES, Mar. 2, 2008, at BU6.

82. Sometimes a business plan based in one country does not translate to another country. A good example is Wal-Mart. The Wal-Mart model is based on loss leader pricing, offering goods at the lowest possible prices as a way of appealing to lower- and middle-class income groups. To do this, of

Data and personal privacy is another important topic that merits evaluation. Following the free market system, in the United States there is a free trade in personal information based on the idea that such trade is in consumers' best interests, similar to the idea of consumer sovereignty discussed above. That is, "personal information is not treated as a right but as a commodity to be freely gathered, accessed, exchanged, and bought and sold on the idea that it is in consumers' best interests as a matter of economic efficiency and satisfying consumer preference."⁸³ Thus, at bottom, the United States model reflects the free market idea.

By contrast, German and European law is highly protective of privacy and personal information in a wide variety of contexts, like consumer data, credit reporting, and workplace privacy.⁸⁴ Under German law, informational privacy is a fundamental right.⁸⁵ It is becoming obvious that Europeans prize the human person, viewing the person as intrinsically valuable and thus placed in the position to control his or her fate, including personal information.

course, Wal-Mart is notorious in paying very low wages and offering meager employment benefits. *See, e.g.,* Adam Nagourney & Michael Barbaro, *Eye on Election, Democrats Run As Wal-Mart Foe*, N.Y. TIMES, Aug. 17, 2006, at A23. Now, how does the Wal-Mart plan transfer over to another country? Sometimes it works. But in Germany it failed. For one thing, the practice of using loss leaders or below-cost pricing is largely forbidden in Europe. Whitman, *supra* note 72, at 376–77. Why? Again, out of concern for protection of integral elements of the economy and protection of consumer interests. *Id.* at 377–79.

83. Edward J. Eberle, *The German Idea of Freedom*, 10 ORE. REV. INT'L L. 1, 71–72 (2008).

84. *See id.* at 71; James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1190–96 (2004) (mentioning authorities collected). "Europeans have aggressively condemned traffic in consumer data." *Id.* at 1192. By comparison, "Americans are much more willing to tolerate industry self-regulation." *Id.* at 1193. Among other things, Europeans protect employees' privacy and criminals at the same level as celebrities. *Id.* at 1194–95.

The fight between the European Union and the United States over a European Council Directive, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, resulted, ultimately, in a safe harbor compromise. Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45,666 (July 24, 2000). These personal privacy issues are still highly contested. *See, e.g.,* Joel R. Reidenberg, *E-commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717 (2001).

For a valuable evaluation of American privacy law, see JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000). *See also* P. Amy Monahan, *Deconstructing Information Walls: The Impact of the European Data Directive on U.S. Business*, 29 LAW & POL'Y INT'L BUS. 275 (1998); Steven R. Salbu, *The European Union Data Privacy Directive and International Relations*, 35 VAND. J. TRANSNAT'L L. 655 (2002).

85. *See, e.g.,* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 65 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (Census Act Case); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 16, 1969, 27 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (Microcensus Case). In the United States, information privacy has not, as yet, risen to the status of a fundamental right. The most pertinent case would be *Whalen v. Roe*, 429 U.S. 589 (1977), in which the Supreme Court simply sketched the idea of informational data protection. There has been no further work on this topic by the Court.

So here, too, we have a fundamental difference: Europeans prize the person and the person should be able to control his or her life. By contrast, Americans prize a faith in the markets; the markets can determine what is appropriate use of personal information. Here, the comparative law approach can be quite valuable: looking at the different legal orders to force a re-evaluation of either or both the foreign and our legal system. Should the free market control the use of personal data? Or should there be some concern for personal welfare in this matter concerning private information?

Many corporations operate multinationally. Consider some of the topics that could benefit from comparative observation: antitrust law (as discussed above), accounting standards, and corporate formation (local or supra national). Let us take a brief look at some of these topics. Let us start with accounting standards. In the United States, the conventional measure is Generally Accepted Accounting Principles (“GAAP”). Under United States accounting standards, the main focus is on the shareholders of the company: “accounting is designed to show shareholders the company cash flow, a practice that necessarily emphasises short term profit performance.”⁸⁶ In employing accounting practices, American accountants take a much more flexible and less cautious approach to appraising assets.⁸⁷ Was the creatively flexible approach of American accountants a major cause of the accounting scandals that rocked the United States in the 1990s, such as the Enron collapse or the demise of Arthur Anderson?⁸⁸

By contrast, European accounting standards have a different focus. In Europe, the American approach “is regarded as lax. Continental European accountants are trained to strictly follow statutory provisions.”⁸⁹ Europeans are much more conservative in their approach to accounting.⁹⁰

86. Bernhard Grossfeld, *Comparative Accounting*, 28 TEX. INT’L L.J. 233, 241 (1993).

87. *Id.* at 244 (“Rigid rules do not prevent an accountant from applying his own judgments, nor do they stand in the way of presenting a ‘true and fair view.’ There is room for fantasy, or more precisely, for creative accounting—whatever that may be!”); see also S.J. Gray, *Towards a Theory of Cultural Influence on the Development of Accounting Systems Internationally*, 24 ABACUS 1, 10 (1998) (observing “much less conservative attitudes of accountants in the U.S.A. and U.K.”).

88. A major problem with the Enron collapse was that accountants manipulated financial statements as a gimmick to show that they complied with the letter, if not the substance, of GAAP. Mark J. Hanson, *Becoming One: The SEC Should Join the World in Adopting the International Financial Reporting Standards*, 28 LOY. L.A. INT’L & COMP. L. REV. 521, 534 (2006). “Enron was able to materially overstate its earnings by not being required to consolidate the earnings results of its SPEs with its own results.” *Id.* at 534–35. In effect, Enron was “cooking the books.” *Id.* at 535.

89. Grossfeld, *supra* note 86, at 244.

90. Gray, *supra* note 87, at 10.

Instead of a focus on shareholders, the European focus is on creditors and banks.⁹¹

For example, German companies often put away hidden reserves as a buffer against financial storms. The accounting difference in Germany and the United States can be huge: “Before Daimler-Benz merged with Chrysler it had reported net income of \$346 million in its statement for 1993. Under GAAP the company would have reported a \$1 billion loss. Under German law Daimler-Benz could include as income \$2.4 billion in reserves taken in prior years.”⁹²

As observed by Professor S.J. Gray, it is obvious that cultural factors play a leading role in countries’ different accounting standards.⁹³ So would the more conservative European accounting approach have helped prevent the Enron collapse? Would a more conservative approach to accounting have provided needed stability to the economy? For these reasons, should Americans reassess their accounting standards? In part, Americans have actually already revised their accounting standards: the adoption of the Sarbanes-Oxley Act of 2002 (“SOX”) mandated stricter accounting standards and prohibited conflicts of interest stemming from accountants performing audits and consulting for the same company.⁹⁴ As a result of SOX, many foreign companies have been dissuaded from listing on United States capital markets due to the rigorous standards and high cost.⁹⁵ Is

91. Grossfeld, *supra* note 86, at 242.

Germany and many other continental European countries see financial statements from a different angle. These statements do not seek primarily to impress investors. Instead, creditors take the first place. Therefore, companies evaluate all assets and liabilities prudently, that is, in case of doubt assign lower values for assets and higher values for liabilities. Why? In the 19th century the banks served as the leading sponsors and promoters of the newly invented “corporations.”

Id. (citations omitted).

92. Bernhard Grossfeld, *Global Accounting: Where Internet Meets Geography*, 48 AM. J. COMP. L. 261, 273 (2000).

93. Gray, *supra* note 87, at 7. As Gray observes, cultural and social values play a leading role in the differing approaches to accounting. For example, external influences might include forces of nature, trade, investment and conquest. Ecological influences can be geographic, economic, demographic, genetic, historical, technological, or related to urbanization. *Id.* at 7. For an important follow-up study to Gray’s article, see Shalin Chanchani & Alan MacGregor, *A Synthesis of Cultural Studies in Accounting*, 18 J. ACCT. LITERATURE 1 (1999) (noting, among other things, the anthropological approach to accounting).

For an important evaluation of issues with the liability of independent external auditors of corporate financial statements that considers the differing approaches of states within the United States and then contrasts them with European approaches, see Werner F. Ebke, *In Search of Alternatives: Comparative Reflections on Corporate Governance and the Independent Auditor’s Responsibilities*, 79 NW. U. L. REV. 663 (1984).

94. 15 U.S.C. § 78j-1(e) (2006).

95. Paul S. Atkins, Comm’r, SEC, Remarks at Finance Dublin (Mar. 26, 2007), *transcript*

SOX now a barrier to foreign capital sources? Or does its stricter standards provide much needed safeguards against financial manipulation? Is GAAP still better? Does its flexibility allow the United States economy to adjust as needed to new economic changes? These are important questions to consider.

And now with the rise of global capital markets spurred on by the emergence of the internet, national markets face many readjustments.⁹⁶ Here, too, accounting plays a major role. What accounting standards should apply? If the American Wall Street markets still control global capital markets, will GAAP still rule? Certainly that is the American preference, based on the idea that GAAP is still the gold standard in accounting and best protects investors. Or, by contrast, will the new accounting standard become the rules of the International Financial Reporting Standards (“IFRS”), formerly known as International Accounting Standards (“IAS”)?⁹⁷ The European Union favors IFRS, whereas the United States favors GAAP.⁹⁸ There are major differences between the two standards. The IFRS is more “pluralistic,” allowing for a number of alternatives in evaluating assets.⁹⁹

GAAP prohibits recognition of deferred taxes; IAS requires it. GAAP requires recognition of certain types of equity compensation benefits; IAS does not. Under GAAP internally generated research and development costs must be treated as an expense when incurred; IAS demands that development costs be capitalized if they meet specific criteria.¹⁰⁰

However, today there is increasing movement toward harmonization of GAAP and IFRS. The Norwalk Agreement of 2002 produced a major effort to harmonize the two accounting standards.¹⁰¹ In short, with the rise

available at <http://www.sec.gov/news/Speech/2007/spch032607psa.htm>.

96. Grossfeld, *supra* note 92, at 266.

97. *Id.* at 275 (“The IASC is a private-sector organization that was created in 1973 by major professional accountancy bodies. Today it includes 133 professional accountancy bodies (representing 103 countries).”).

98. *Id.* at 275.

99. *Id.* at 277 (“As a result corporations from different national accounting backgrounds all pretend that their financial statements have been prepared in conformity with IAS.”).

100. *Id.* at 280.

101. Hanson, *supra* note 88, at 546–47. The SEC is now “preparing a timetable that will permit American companies to shift to the international rules, which are set by a foreign organization and give companies greater latitude in reporting earnings.” Stephen Labaton, *Accounting Plan Would Allow Use of Foreign Rules*, N.Y. TIMES, July 5, 2008, at A1. One problem, however, is that foreign enforcement authorities are generally less rigorous in enforcing standards than the SEC. *Id.*; see also Bernhard Grossfeld, *Comparative Corporate Governance: Generally Accepted Accounting Principles v.*

of a globally linked world, we have competing capital markets, which in turn will lead to competing rules and standards, as examined here with respect to accounting. Most likely, the capital markets will determine the outcome. So, what will happen? A convergence of global accounting standards, along the lines of IFRS? If so, will that lead to “outsourcing safety standards,” as Professor James Cox commented?¹⁰² Or will GAAP still control insofar as American capital markets still prevail? There is much to examine here from a comparative perspective.

Another corporate issue involves the formation of a corporation. In the United States, corporate law is regulated by each of the fifty states. National corporations will often choose to incorporate in the state with the most lax laws, creating a so-called “race to the bottom,” with Delaware as the most prominent site for the incorporation of national companies. In Europe, the Member States of the European Union each have different rules. The United Kingdom is among the more lax, somewhat akin to the United States, and Germany is among the more strict, with its co-determination laws that give workers a stake in running the company.¹⁰³ After a long struggle in the European Union, mainly over workers’ participation in management, a European corporate form is now in place, the *Societas Europaea* (“SE”), which allows business operations to take place throughout the European Union.¹⁰⁴

Should the United States follow this model? Or is state-by-state control better, reflecting the American tendency toward federalism? Would a national United States corporation make for more harmonization of rules,

International Accounting Standards?, 28 N.C. J. INT’L L. & COM. REG. 847 (2002); David S. Ruder et al., *Creation of World Wide Accounting Standards: Convergence and Independence*, 25 NW. J. INT’L L. & BUS. 513 (2005).

102. Labaton, *supra* note 101.

103. In Germany, for example, business organizations with more than five hundred employees must have a supervisory board that supervises the operation of the company, consisting of two-thirds shareholders and one-third employee representatives. If the company has more than two thousand employees, the supervisory board must consist of fifty percent shareholders and fifty percent employees’ representatives. Herbert Wiedemann, *Codetermination by Workers in German Enterprises*, 28 AM. J. COMP. L. 79–80 (1980).

104. For evaluation of the controversy surrounding SE in the phase leading up to its adoption, see Werner F. Ebke, *Company Law and the European Union: Centralized Versus Decentralized Lawmaking*, 31 INT’L LAW. 961 (1997). The SE was finally approved by the EU in 2004. “The SE must be established as a public-limited liability company and have a minimum legal capital of 120,000 euros.” Marco Ventoruzzo, “Cost-Based” and “Rules-Based” Regulatory Competition: Markets for Corporate Charters in the U.S. and in the E.U., 3 N.Y.U. J.L. & BUS. 91, 144 (2006). Thus, the SE is mainly an option for large companies on account of the costs and cumbersome procedure of formation. Benjamin Angelette, *The Revolution That Never Came and the Revolution Coming—De Lasteyrie Du Salliant, Marks & Spencer, Sevic Systems and the Changing Corporate Law in Europe*, 92 VA. L. REV. 1189, 1210 (2006). See *id.* for an evaluation of the increasing mobility of incorporators to form and move corporations around the EU.

lower transactions costs, more mobility, and a more efficient operation? By contrast, does the American state-by-state approach still have broad appeal because it addresses the concern for limitation of government? Which do Americans favor: big corporations or big government? Or, should the countries of Canada, Mexico, and the United States consider adopting a NAFTA corporation, modeled on the *SE*? Would this offer the same benefits as the *SE*? Evaluation of this public policy question could be quite valuable, especially given the increasing changes in national and global economies.

A final important public policy to consider is criminal law. In the United States, the focus is on retribution for crimes committed. Accordingly, the United States is the only Western country, and one of the few countries in the world, that still applies the death penalty. For noncapital but serious offenses, the penalty is life or long-term imprisonment. Incarceration rates are higher in the United States than in any Western country, more on par with countries like China and Russia.¹⁰⁵ A person can be jailed even for minor violations, such as “smoking cigarettes in the New York subway” or “driving without a seatbelt,” the criminality of which the Supreme Court has upheld.¹⁰⁶ In the United States, the policy of retribution might reflect strong Christian values based on Old Testament retribution; underlying issues of racism, yet pervasive in American society; or the prevalence of violence.¹⁰⁷

By contrast, the European focus is on rehabilitation, not retribution. There is no death penalty in Europe; life imprisonment is used sparingly, only in the case of extremely heinous crimes,¹⁰⁸ and the focus is instead on rehabilitation so that convicted criminals can reenter society and resume a

105. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 4 (2003). One major influence on the increased incarceration rate is the “three-strikes-and-you’re-out” policy, a baseball metaphor itself reflecting American culture. *Id.* at 56.

106. *Id.* at 3.

107. *Id.* at 6.

108. In Germany, for example, life imprisonment may be imposed as a penalty only in the event of an especially heinous crime, such as a horrible murder, that also presents a need to protect the public. For example, in November 2006 a court found life imprisonment appropriate for Stephan Letter, “a nurse described as Germany’s worst serial killer since World War II, [who] was convicted of killing 28 patients at a hospital in southern Sonthofen in 2003 and 2004 . . . injecting them with a mixture of drugs.” *Germany: Nurse Guilty of Killing 28 Patients*, N.Y. TIMES, Nov. 21, 2006, at A14. Even then, a sentence of life imprisonment is reviewed every fifteen years to determine if the life sentence should remain in effect or, instead, if the felon should be released from prison. Emails from Professor Winfried Brugger to author (Nov. 28, 2006 & Oct. 29, 2008) (on file with author). In other words, the right to preserve existing human life takes precedence over the rehabilitation of the murderer. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 21, 1977, 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187 (Life Imprisonment Case).

normal life. For example, in the famous German case of *Lebach*,¹⁰⁹ the German Constitutional Court determined that a felon's personal rights to a healthy re-entry into society, after serving his prison term, outweighed the showing of an accurate documentary depicting his and others' roles in a notorious crime. That is, personal rights trumped expressive rights. The value of the person was more important than the broadcast. Thus, the European policy likely reflects concern with human dignity, nurturing of people and mercy as a virtue, a Christian New Testament value.¹¹⁰ The idea of rooting the legal order in human dignity is based, significantly, of course, in a reaction to the Nazi era. So here, should a careful look at alternative approaches to theories of criminal punishment add dimensions and insights into the proper basis for criminal law?¹¹¹ Should the United States, as a Western country, better reflect Western culture? What about the economic costs of the burgeoning prison population? Could money be better saved by trying to rehabilitate criminals and reintroduce them to society as productive citizens? Would this effort help both save money and spur the economy? Would it also better reflect the Christian values of treating people as valuable and equal or the philosophic norm of treating people with dignity? Would a focus on rehabilitation help give criminals a second chance so that they might be able to live as normal human beings in daily life? Or is it better for the United States to follow more severe models of penal law, as in China, Russia, or Iran? Are the economic costs worth keeping criminals off the street in order to safeguard the public?

This short examination of topics of significant public policy importance reveals that comparative law has much to offer as a window into alternative solutions for pressing policy issues. It can be quite useful to look outside our borders to see if other perspectives can usefully shed light on core policy questions. Illuminating alternative views on important policy issues can, in turn, force a healthy reassessment of and dialogue on these issues. We need comparative law to take on these broader missions.

IV. CONCLUSION

It is clear that comparative law is in need of an overhaul if it is to take its rightful place as an important legal science, along the lines of the new movements that have developed over the last thirty years, such as law and

109. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 5, 1973, 35 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 202.

110. WHITMAN, *supra* note 105, at 13; *see also* Savelsberg, *supra* note 23.

111. *See, e.g.*, WHITMAN, *supra* note 105.

economics and Critical Legal Studies. First, we need to focus on developing and applying a sound methodology, as employed in law and economics. I have set forth a four-step process. Step 1 consists of acquiring the skills of a comparativist. Step 2 involves applying comparative skill to evaluate the external law. Step 3 similarly calls for the application of comparative skills to evaluate the internal law. Finally, Step 4 entails assembling the observations resulting from the comparative investigation. Perhaps others will find alternative, better comparative law methodologies. We certainly need to assess and reassess the proper approach.

Additionally, comparative law must take on broader missions. We need to explore more deeply non-Western and nontraditional cultures. We need to step outside of our own native predispositions to see if we can learn more from those influenced by different cultural patterns. Looking outside the west might have a major influence on personal behavior, communal ties and support, stewardship of the earth's resources, and trading practices, among other subjects. And comparative law needs to be employed to help shed insight on major public policy issues. I have mentioned just a few: antitrust, consumerism, data privacy, accounting, formation of corporations, and criminal law. There are many more to consider.

Comparative law should now be set up to serve a new and important role in the twenty-first century. Through comparative law we can embark on a new course as we try to figure out what to do in our modern, increasingly globalized world. Comparative law has a large role to play here. We need to take on these new tasks as a way to improve human welfare and our legal order, whether national, regional, or international. Understanding law and culture is key to understanding people, and in the end, understanding people is what we need to do.